

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

THERESA M. SERAQUIEL,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner  
of Social Security,

Defendant.

NO: 12-CV-0169-TOR

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment (ECF Nos. 14, 17). Plaintiff is represented by Lora Lee Stover. Defendant is represented by Stephanie Lynn F. Kiley. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. There being no reason to delay a decision, the hearing set for February 18, 2014, is vacated and this matter is submitted without oral argument. For the reasons discussed below, the Court grants Defendant's motion and denies Plaintiff's motion.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT ~ 1

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 688 F.3d 1144, 1149 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the

1 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district  
2 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
3 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]  
4 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).  
5 The party appealing the ALJ’s decision generally bears the burden of establishing  
6 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

#### 7 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

8 A claimant must satisfy two conditions to be considered “disabled” within  
9 the meaning of the Social Security Act. First, the claimant must be “unable to  
10 engage in any substantial gainful activity by reason of any medically determinable  
11 physical or mental impairment which can be expected to result in death or which  
12 has lasted or can be expected to last for a continuous period of not less than twelve  
13 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be  
14 “of such severity that he is not only unable to do his previous work[,] but cannot,  
15 considering his age, education, and work experience, engage in any other kind of  
16 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
17 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to  
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R.  
20 § 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s

1 work activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in  
2 “substantial gainful activity,” the Commissioner must find that the claimant is not  
3 disabled. 20 C.F.R. § 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis  
5 proceeds to step two. At this step, the Commissioner considers the severity of the  
6 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from  
7 “any impairment or combination of impairments which significantly limits [his or  
8 her] physical or mental ability to do basic work activities,” the analysis proceeds to  
9 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy  
10 this severity threshold, however, the Commissioner must find that the claimant is  
11 not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to  
13 several impairments recognized by the Commissioner to be so severe as to  
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R.  
15 § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the  
16 enumerated impairments, the Commissioner must find the claimant disabled and  
17 award benefits. 20 C.F.R. § 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity  
19 of the enumerated impairments, the Commissioner must pause to assess the  
20 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),

1 defined generally as the claimant's ability to perform physical and mental work  
2 activities on a sustained basis despite his or her limitations (20 C.F.R.  
3 § 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

4 At step four, the Commissioner considers whether, in view of the claimant's  
5 RFC, the claimant is capable of performing work that he or she has performed in  
6 the past ("past relevant work"). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is  
7 capable of performing past relevant work, the Commissioner must find that the  
8 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of  
9 performing such work, the analysis proceeds to step five.

10 At step five, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant is capable of performing other work in the national economy.  
12 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner  
13 must also consider vocational factors such as the claimant's age, education and  
14 work experience. *Id.* If the claimant is capable of adjusting to other work, the  
15 Commissioner must find that the claimant is not disabled. 20 C.F.R.  
16 § 416.920(g)(1). If the claimant is not capable of adjusting to other work, the  
17 analysis concludes with a finding that the claimant is disabled and is therefore  
18 entitled to benefits. *Id.*

19 The claimant bears the burden of proof at steps one through four above.  
20 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If

1 the analysis proceeds to step five, the burden shifts to the Commissioner to  
2 establish that (1) the claimant is capable of performing other work; and (2) such  
3 work “exists in significant numbers in the national economy.” 20 C.F.R.  
4 § 416.960(c)(2); *Beltran v. Astrue*, 676 F.3d 1203, 1206 (9th Cir. 2012).

#### 5 ALJ’S FINDINGS

6 Plaintiff applied for supplemental security income (SSI) payments on  
7 January 16, 2009. Tr. 133-36. She alleged disability beginning on December 31,  
8 1989, due to a learning disability, memory deficiencies, and bipolar disorder. Tr.  
9 133, 162. Her claims were denied initially and on reconsideration. Tr. 91-97.

10 Plaintiff filed a timely request for a hearing and appeared with an attorney at a  
11 hearing before an administrative law judge (“ALJ”) on July 20, 2010. Tr. 44-78.

12 The ALJ issued his decision on July 6, 2010, finding that Plaintiff had severe  
13 impairments and had no past relevant work. Tr. 19-37. Because the ALJ found  
14 that work existed in the national economy that Plaintiff could perform, however, he  
15 found that Plaintiff was not disabled under the Act. Tr. 31-32. On February 7,  
16 2012, the Appeals Council denied Plaintiff’s request for review, making the ALJ’s  
17 decision the Commissioner’s final decision that is subject to judicial review. Tr. 1-  
18 6; 20 C.F.R. §§ 416.1481, 422.210.

19 //

20 //

## ISSUES

Plaintiff, Theresa M. Seraquiel, seeks judicial review of the Commissioner's final decision denying her Title XVI Supplemental Security Income. Plaintiff has raised two issues for review: (1) whether the ALJ erred in assessing her residual functional capacity; and (2) whether the ALJ erred in discrediting Plaintiff's testimony about the severity of her physical and mental impairments. ECF No. 15 at 9.

## DISCUSSION

### **A. The ALJ's Residual Functional Capacity Assessment**

As noted above, residual functional capacity ("RFC") is defined as the claimant's ability to perform physical and mental work activities on a sustained basis despite his or her limitations. 20 C.F.R. § 416.945(a)(1). In making an RFC assessment, the Commissioner is required to consider all of the claimant's impairments, including impairments that are not "severe" within the meaning of the regulations. 20 CFR § 416.945(a)(2).

In this case, the ALJ assessed Plaintiff's RFC as follows:

[C]laimant has the residual functional capacity to perform medium work as defined in 20 CFR [§] 416.967(c), but that her capacity for the full range of medium work has been reduced by mental impairments that have resulted in deficits of concentration, persistence, and pace that have precluded her from performing more than simple repetitive tasks; and deficits of social functioning that have precluded her from performing tasks requiring more than

1 superficial occasional contact with the general public or more than  
2 occasional contact with coworkers.

3 Tr. 27. In making this finding, the ALJ “considered all symptoms and the extent to  
4 which these symptoms can reasonably be accepted as consistent with the objective  
5 medical evidence and other evidence.” Tr. 27.

6 Plaintiff contends that the ALJ erred in finding her capable of performing  
7 simple, repetitive tasks which involve only superficial contact with the general  
8 public and only occasional contact with coworkers. ECF No. 15 at 12. According  
9 to Plaintiff, this finding does not adequately account for mental limitations noted  
10 by psychologist Scott Mabee, Ph.D., in December 2008, April 2009, and  
11 November 2009. Specifically, Plaintiff argues that the ALJ did not appropriately  
12 consider her limited abilities to “deal with supervisors, handle stress, maintain  
13 appropriate behavior, and learn new tasks.” ECF No. 15 at 12.

14 A treating physician’s opinions are entitled to substantial weight in social  
15 security proceedings. *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
16 (9th Cir. 2009). If a treating or examining physician’s opinion is uncontradicted, an  
17 ALJ may reject it only by offering “clear and convincing reasons that are supported  
18 by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.  
19 2005). “However, the ALJ need not accept the opinion of any physician, including  
20 a treating physician, if that opinion is brief, conclusory and inadequately supported  
by clinical findings.” *Bray*, 554 F.3d at 1228 (quotation and citation omitted).



1 Contrary to Plaintiff's assertions, the ALJ appropriately balanced the  
2 conflicting findings offered by Dr. Mabee in December 2008, April 2009 and  
3 November 2009. In December 2008, Dr. Mabee found that Plaintiff suffered from  
4 (1) mild limitations in cognitive functioning; and (2) marked to severe limitations  
5 in social functioning.<sup>1</sup> Tr. 307. Dr. Mabee further found that Plaintiff's  
6 occupational GAF score of 50 "suggests that she would have serious difficulties

7  
8 <sup>1</sup> These findings were recorded on a "Psychological/Psychiatric Evaluation" form  
9 prepared by the Washington State Department of Social and Health Services  
10 ("DSHS"). This form requires an examining physician to rate the patient's level of  
11 impairment on several "cognitive factors" and "social factors" on a five-level scale  
12 from "none" to "severe." Cognitive factors include the patient's ability to (1)  
13 understand, remember and follow simple (one or two step) instructions; (2)  
14 understand, remember, and follow complex (more than two step) instructions; (3)  
15 learn new tasks; (4) exercise judgment and make decisions; and (5) perform  
16 routine tasks. Social factors include the patient's ability to (1) relate appropriately  
17 to co-workers and supervisors; (2) interact appropriately in public contacts; (3)  
18 respond appropriately to and tolerate the pressures and expectations of a normal  
19 work setting; (4) care for self, including personal hygiene and appearance; and (5)  
20 control physical or motor movements and maintain appropriate behavior. Tr. 307.

1 functioning in a typical work environment.” Tr. 314. The ALJ afforded “little  
2 weight” to these findings, noting that they were (1) inconsistent with Plaintiff’s  
3 reported activities of daily living; (2) heavily based upon Plaintiff’s self-reports;  
4 (3) conclusory; (4) “inconsistent with the examination notes and findings;” (5) “not  
5 well supported by [Dr. Mabee’s] clinical findings such as an unremarkable mental  
6 status examination;” and (6) internally inconsistent to the extent that Dr. Mabee  
7 had noted only “mild cognitive limitations in work abilities,” but also diagnosed  
8 Plaintiff with borderline intellectual functioning. Tr. 30.

9 In April 2009, Dr. Mabee rated Plaintiff’s cognitive functioning impairments  
10 as mild to moderate. Tr. 321. This assessment was generally consistent with the  
11 December 2008 evaluation. In sharp contrast to the December 2008 evaluation,  
12 however, Dr. Mabee rated Plaintiff’s social functioning impairments as only mild  
13 to moderate. Tr. 321. In Dr. Mabee’s view, this improvement in social  
14 functioning was likely the result of Plaintiff taking her prescribed medication. Tr.  
15 326. “[I]f she is able to continue with her current prescribed medication regimen,”  
16 Dr. Mabee opined, “then it is likely [that] her social interactions with others will  
17 improve. Her current ability to persist in a work environment is improving and it  
18 is likely that upon further stabilization of her symptoms that she should be able to  
19 return to at least entry-level employment in the near future.” Tr. 327. The ALJ  
20 afforded “significant weight” to these findings, noting that they were (1) based

1 upon an in-person examination of Plaintiff; (2) consistent with Plaintiff's reported  
2 activities of daily living; (3) consistent with clinical findings and test results; and  
3 (4) "consistent with the overall objective evidence of record that shows that  
4 although [Plaintiff] has mental impairments, [Plaintiff] is not as limited in her  
5 ability to function as alleged." Tr. 30.

6 In November 2009, Dr. Mabee once again rated Plaintiff's cognitive  
7 functioning impairments as mild to moderate. Tr. 450. With regard to social  
8 functioning, Dr. Mabee rated Plaintiff's impairments as moderate to marked.  
9 Tr. 450. This rating fell between the December 2008 rating (marked to severe) and  
10 April 2009 rating (mild to moderate). In making this evaluation, Dr. Mabee opined  
11 that "anxiety and uncertainty will create interpersonal difficulties, [and Plaintiff]  
12 will often miss work for fear of social interaction." Tr. 450. As with the  
13 December 2008 findings, the ALJ afforded these findings "little weight." Tr. 30.  
14 In reaching this conclusion, the ALJ noted that Dr. Mabee's most recent findings  
15 were (1) heavily based upon Plaintiff's self-reports; (2) inconsistent<sup>2</sup> with  
16

---

17 <sup>2</sup> The ALJ's opinion reads that Dr. Mabee's opinion was "*consistent* with the  
18 claimant's activities of daily living reported elsewhere." Tr. 30 (emphasis added).  
19 It appears from both the context of the sentence and from the record itself that the  
20 ALJ intended to state that Plaintiff's activities of daily living, such as attending

1 Plaintiff's activities of daily living; (3) conclusory; (4) not well supported by  
2 clinical findings; and (5) "inconsistent with exam findings that [Plaintiff] was  
3 cooperative, with normal speech, and appropriate thought process." Tr. 30.

4 Having thoroughly reviewed the record, the Court concludes that the ALJ's  
5 RFC assessment is supported by substantial evidence. As the ALJ correctly  
6 observed, Dr. Mabee's December 2008, April 2009 and November 2009  
7 evaluations suggest that Plaintiff's mental impairments, while genuine, were not as  
8 severe as Plaintiff claimed. For example, the December 2008 and November 2009  
9 evaluations—which found Plaintiff's social functioning impairments to be marked  
10 to severe and moderate to marked, respectively—expressly noted that that Plaintiff  
11 may have exaggerated the extent of her impairments:

12 The [Personality Assessment Inventory] was administered to add  
13 information regarding Ms. Seraquiel's emotional functioning. Her  
14 profile (see attached) was deemed questionably valid due to subtle  
15 suggestions that she may have portrayed herself in an especially  
16 negative manner. She presented with certain patterns and  
combinations of features that are unusual in clinical populations, but  
somewhat common among individuals feigning a mental disorder.  
Any interpretations should be made with this in mind.

17 Tr. 312.

18  
19 substance abuse support group sessions and helping with cooking and cleaning,  
20 were *inconsistent* with Dr. Mabee's findings. See Tr. 449.

1 To assess [Plaintiff's] emotional functioning, she was administered  
2 the [Personality Assessment Inventory]. Her profile (see attached)  
3 was deemed valid although there were some suggestions she may  
4 have portrayed herself in a negative manner. She had significant  
5 elevations on many scales. There may have been more symptoms  
6 reported than are objectively present.

7 Tr. 452. These disclaimers by Plaintiff's own psychologist strongly support the  
8 ALJ's conclusion that Plaintiff's mental impairments were not as severe as she  
9 claimed.

10 By way of further example, the April 2009 evaluation notes that Plaintiff  
11 was enrolled in school and was able to attend classes four times per week for a  
12 period of three to four hours per day. Tr. 325. This same evaluation states that  
13 Plaintiff routinely ran errands, attended appointments, and rode the bus. Tr. 325.  
14 As the ALJ appropriately recognized, these activities are highly inconsistent with  
15 Plaintiff's self-reported inability to function in a typical work environment due to  
16 severe social anxiety. Indeed, Dr. Mabee noted that, "[u]pon completing her  
17 education, [Plaintiff] may benefit from vocational training to increase her  
18 employability and a job assistance program to help her find employment that  
19 would accommodate her limitations." Tr. 327.

20 At bottom, the record contains substantial evidence to support the ALJ's  
finding that Plaintiff was capable of performing medium work as defined in 20  
C.F.R. § 416.967(c)—provided that she was limited to (1) performing "simple  
repetitive tasks; and (2) having only "superficial occasional contact with the

1 general public” and “occasional contact with coworkers.” Tr. 27. This  
2 assessment, which adequately accounts for Plaintiff’s limited ability to “deal with  
3 supervisors, handle stress, maintain appropriate behavior, and learn new tasks,”  
4 ECF No. 15 at 12, is strongly supported by Dr. Mabee’s April 2009 findings. The  
5 ALJ offered specific, clear and convincing reasons for accepting these findings  
6 over Dr. Mabee’s December 2008 and November 2009 findings. Accordingly, the  
7 ALJ did not err in assessing Plaintiff’s RFC.

#### 8 **B. The ALJ’s Adverse Credibility Findings**

9 In social security proceedings, a claimant must prove the existence of  
10 physical or mental impairment with “medical evidence consisting of signs,  
11 symptoms, and laboratory findings.” 20 C.F.R. § 416.908. A claimant’s  
12 statements about his her symptoms alone will not suffice. 20 C.F.R. §§ 416.908;  
13 416.929(a). Once an impairment has been proven to exist, the claimant need not  
14 offer further medical evidence to substantiate the alleged severity of his or her  
15 symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc). As  
16 long as the impairment “could reasonably be expected to produce [the] symptoms,”  
17 20 C.F.R. §416.929(b), the claimant may offer a subjective evaluation as to the  
18 severity of the impairment. *Id.* This rule recognizes that the severity of a  
19 claimant’s symptoms “cannot be objectively verified or measured.” *Id.* at 347  
20 (quotation and citation omitted).

1 In the event that an ALJ finds the claimant's subjective assessment  
2 unreliable, however, "the ALJ must make a credibility determination with findings  
3 sufficiently specific to permit [a reviewing] court to conclude that the ALJ did not  
4 arbitrarily discredit claimant's testimony." *Thomas v. Barnhart*, 278 F.3d 947, 958  
5 (9th Cir. 2002). In making such a determination, the ALJ may consider, *inter alia*:  
6 (1) the claimant's reputation for truthfulness; (2) inconsistencies in the claimant's  
7 testimony or between his testimony and his conduct; (3) the claimant's daily living  
8 activities; (4) the claimant's work record; and (5) testimony from physicians or  
9 third parties concerning the nature, severity, and effect of the claimant's condition.  
10 *Id.* If there is no evidence of malingering, the ALJ's reasons for discrediting the  
11 claimant's testimony must be "specific, clear and convincing." *Chaudhry v.*  
12 *Astrue*, 688 F.3d 661, 672 (9th Cir. 2012) (quotation and citation omitted). The  
13 ALJ "must specifically identify the testimony she or he finds not to be credible and  
14 must explain what evidence undermines the testimony." *Holohan v. Massanari*,  
15 246 F.3d 1195, 1208 (9th Cir. 2001).

16 Plaintiff argues that the ALJ improperly discredited her testimony  
17 concerning her physical and mental impairments. ECF No. 15 at 13-14. Contrary  
18 to Plaintiff's assertions, the ALJ provided specific, clear and convincing reasons  
19 for discrediting her testimony concerning the severity of her physical and mental  
20 impairments. First, the ALJ found that Plaintiff had a "very poor work history"

1 dating back to 1989. Tr. 28. In the ALJ's view, the fact that Plaintiff had no  
2 reported income for nearly twenty years prior to filing her disability claim  
3 suggested that Plaintiff was simply unwilling—rather than unable—to work.  
4 Tr. 28. This finding was further reinforced by the ALJ's observation that Plaintiff  
5 had demonstrated “poor motivation” during a November 2009 psychological  
6 evaluation by Dr. Mabee. Tr. 28.

7       Second, and in a related vein, the ALJ discounted Plaintiff's testimony due  
8 to her history of illegal drug use. Specifically, the ALJ noted that “[t]here is no  
9 evidence or record that suggests that the claimant has ever been motivated to work;  
10 however, there is ample evidence that she has had the wherewithal to obtain illicit  
11 drugs to support years of polysubstance abuse.” Tr. 28. Thus, the ALJ viewed  
12 Plaintiff's persistent drug use as evidence that her physical and mental impairments  
13 were not so severe as to preclude her from achieving complex goals when she was  
14 motivated to do so.

15       Third, the ALJ found several inconsistencies between Plaintiff's testimony  
16 and her own conduct. Specifically, the ALJ found that (1) despite her alleged  
17 inability to walk farther than one block, Plaintiff had engaged in regular exercise in  
18 March and October 2009; (2) despite testifying that she never attempted to lift  
19 anything, Plaintiff admitted to being able to lift a gallon of milk; (3) despite her  
20 claims of severe back and stomach pain, Plaintiff reported significant



1 improvements in her back and pelvic pain following surgery in May 2010; (4)  
2 despite her allegations of having been disabled since 1989, Plaintiff reported in  
3 November 2008 that she had not received medical care for approximately three  
4 years; (5) despite claims that she could not function effectively around others due  
5 to social anxiety, Plaintiff was attending classes four days per week while working  
6 toward a GED degree in April 2009; and (6) despite claims that she suffered from  
7 severe memory loss, Plaintiff had given “a detailed personal history that included  
8 marital, medical, substance abuse, and vocational information going back a number  
9 of years” in December 2008. Tr. 28.

10 Finally, the ALJ noted that the record was largely devoid of objective  
11 medical evidence to support the alleged severity and limiting effects of Plaintiff’s  
12 physical and mental impairments. Tr. 28-29. As discussed above, the ALJ found  
13 that Plaintiff’s activities of daily living and the results of her mental status exams  
14 were inconsistent with one or more totally disabling mental impairments. Tr. 29.  
15 With regard to Plaintiff’s physical impairments, the ALJ found that Plaintiff’s  
16 medical records did not support her claims of disabling back pain and “female  
17 problems.” Among other things, the ALJ noted that Plaintiff “sought medical care  
18 a number of times without complaining of any back or abdominal pain,” and that a  
19 July 2009 physical examination found “no pain behaviors to palpitation or  
20

1 percussion of the thoracolumbar spine, no paravertebral spasm, motor strength [of]  
2 4-5/5 in all extremities, and [that Plaintiff's] gait was normal." Tr. 28.

3 Having thoroughly reviewed the record, the Court concludes that the ALJ  
4 supported his adverse credibility findings with specific, clear and convincing  
5 reasons which are supported by substantial evidence. As the ALJ appropriately  
6 recognized, the record demonstrates that Plaintiff's physical and mental  
7 impairments, while genuine, are not so severe as to preclude her from performing  
8 light duty work with appropriate limitations. Accordingly, the Court grants  
9 summary judgment in Defendant's favor.

10 **ACCORDINGLY, IT IS HEREBY ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (ECF No. 14) is **DENIED**.

12 2. Defendant's Motion for Summary Judgment (ECF No. 17) is

13 **GRANTED.**

14 3. The hearing set for February 18, 2014, is **VACATED**.

15 The District Court Executive is hereby directed to file this Order, enter  
16 Judgment for Defendant, provide copies to counsel, and **CLOSE** this file.

17 **DATED** this 23rd day of October, 2012.

18 *s/ Thomas O. Rice*

19 THOMAS O. RICE  
20 United States District Judge